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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF THE STATE OF CALIFORNIA

MARTHA RAUDA, REGULO PUEBLA, individually and as successors in interest to MARTHA PUEBLA, decedent,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a public entity, CHIEF WILLIAM BRATTON, an individual, DETECTIVE MARTIN PINNER, an individual, DETECTIVE JUAN RODRIGUEZ, an individual, AND DOES 1 THROUGH 10

Defendants.

NO. CV-08-3128 CAS (PJWx)

PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT NOTICE OF MOTION AND MOTION FOR ATTORNEYS FEES AND COSTS PURSUANT TO 42 U.S.C. SECTION 1988

[DECLARATIONS OF BENJAMIN SCHONBRUN, MICHAEL D. SEPLOW AND JOHN RAPHLING IN SUPPORT THEREOF FILED UNDER SEPARATE COVER]

Hearing Date: December 20, 2010
Hearing Time: 10:00 a.m.
Courtroom: 5

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STATUTES

I. INTRODUCTION

Plaintiffs have demonstrated that they are entitled to an award of substantial attorneys fees because they prevailed on all of their claims at trial on a case involving significant legal issues and because their efforts in litigating this case resulted in tangible benefits and advanced significant public goals. Contrary to Defendants' assertions, Plaintiffs did prevail on a *Monell* theory and established that the actions of Defendants Pinner and Rodriguez were pursuant to an official custom, policy or practice of the Los Angeles Police Department ("LAPD"). As a result of this case, the LAPD implemented new training for its detectives regarding the dangers of using real persons in ruses–training which Defendants Pinner and Rodriguez had not received prior to their interrogation of double murder suspect Jose Ledesma.

Moreover, Defendants have not shown that the hourly rates requested by Plaintiffs counsel, or the amount of time they spent litigating this hard fought case, are unreasonable. Finally, Defendants' contention that Plaintiffs' motion for attorneys fees should be denied because Plaintiffs purportedly served incorrect interrogatory responses is completely without merit. Accordingly, Plaintiffs' motion for an award of attorneys fees should be granted.

II. PLAINTIFFS ACHIEVED A HIGH DEGREE OF SUCCESS AND THEREFORE ARE ENTITLED TO AN AWARD OF ATTORNEYS FEES CONSISTENT WITH THE AMOUNT REQUESTED.

Despite the fact that Plaintiffs prevailed on each and every cause of action asserted at trial, Defendants erroneously argue that Plaintiffs only achieved a minimal level of success and therefore are not entitled to an award of attorneys fees under 42 U.S.C. Section 1988. Defendants' arguments should be rejected for numerous reasons.

Defendants have conceded, well established law provides that Plaintiffs

should be awarded attorneys fees when they have achieved other tangible results despite the award of nominal damages. *See Mahach-Watkins v. Depee*, 593 F.3d 1054, 1059 (9th Cir. 2010); *Guy v. City of San Diego*, 608 F.3d 582, 588-89 (9th Cir. 2010); *Wilcox v. City of Reno*, 42 F.3d 550, 555 (9th Cir. 1994). Indeed, in addition to the question of damages, the Court must consider "the significance of the legal issue on which the plaintiff claims to have prevailed" and whether the plaintiff "accomplished some public goal." *Mahach-Watkins v. Depee*, 593 F.3d at 1059.[1/]

In this case, Defendants have acknowledged that "the legal issue of 'state created' danger is an important issue." [Opposition at 15:9-10] However, Defendants mistakenly contend that because Plaintiffs prevailed on their *Monell* claim based on a ratification theory, that Plaintiffs did not establish that the actions of Defendants Pinner and Rodriguez were pursuant to an official custom, policy or practice of the LAPD. Defendants incorrectly assert that because Plaintiffs did not present evidence of the improper use of ruses by other LAPD detectives, Plaintiffs did not establish that the LAPD had an unconstitutional custom, policy or practice. [Opposition at pp. 4-6][2/]

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1. As Plaintiffs have acknowledged, the fact that they only received nominal damages is a factor which weighs against their attorneys fees motion. Nonetheless, the amount of damages awarded "is only one of many factors a court should consider in calculating an award of attorney's fees." *Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

2. Defendants' reliance on *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) is entirely misplaced. In *Tuttle,* a case in which the individual defendant was found not liable for a Section 1983 excessive force violation, the Court held that a jury could not infer that the City had an unconstitutional policy of inadequate training under *Monell* based on a single incident. The issue of ratification was simply not present in *Tuttle* where, unlike this case, there was no proof "of a single action taken by a municipal policy maker." 471 U.S. at 821. In this case, Plaintiffs presented evidence that William Bratton, the Chief of the LAPD, as well as others within the LAPD chain of command, acted affirmatively

However, it is well established that the existence of a pre-existing policy, practice or custom can be established by evidence that the policy maker approved or ratified the unlawful conduct of the officers in the underlying case. *See Larez v. City of Los Angeles*, 946 F.2d 630, 647 (9th Cir. 1991) (" a jury could properly find such policy or custom from the failure of [the Chief] . . . to take any remedial steps after the violations."). [3/] In this case, the jury determined that former LAPD Chief William Bratton, who is the official policy maker for the Los Angeles Police Department, ratified the actions of Detectives Pinner and Rodriguez. This means that Plaintiffs established at trial that the unconstitutional actions of Defendants Pinner and Rodriguez were in conformity with official LAPD policy. *See Larez, supra*, 946 F.2d at 646. ("[E]vidence that [the Chief of the Los Angeles Police Department], an authorized policymaker on police matters..... ratified a decision that deprived plaintiffs of their constitutional rights would suffice for official liability.").

In order to establish a *Monell* claim based on official policy, practice or custom, Plaintiffs did not need to show that the LAPD affirmatively trained its detectives to use ruses in the manner in which Pinner and Rodriguez acted or that

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to ratify the unconstitutional actions of Defendants Pinner and Rodriguez.

3. *See also Grandstaff v. City of Borger*, 767 F.2d 161, 170-71 (5th Cir. 1985) (Jury may find official policy based on police chief's ratification and failure to reprimand or discharge officers who violated plaintiff's rights noting that the "disposition of the policymaker may be inferred from his conduct after the events" at issue.) *cert. denied*, 480 U.S. 916 (1987), *abrogated on other grounds* in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993); *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) ("Policy or custom may be inferred if, after the [alleged unconstitutional actions], the... officials took no steps to reprimand or discharge the [officers], or if they otherwise failed to admit the [officers'] conduct was in error.").

the practice was widespread throughout the LAPD.[4/] Rather it is the fact that these detectives were allowed to use the ruse in the manner that they did without any reprimand or discipline from the LAPD which demonstrates the deficiencies with the LAPD's training and the unconstitutional nature of LAPD's official policy.[5/]

The jury determined that by failing to discipline Pinner and Rodriguez that the LAPD ratified their unconstitutional actions and confirmed that their actions were within policy. This is precisely why the new training that resulted from this case is so important. By implementing this new training on the dangers in using a real person's name in connection with a ruse, the LAPD recognized that there were serious deficiencies with their prior training. Defendants should not be allowed to gloss over the fact that this case resulted in both a finding that the detectives acted within LAPD policy, as well as a clear change in policy and training by the LAPD, which benefits both the LAPD (one of the nation's leading police agencies) and the general public. Therefore, it cannot be denied that this case has achieved a critically important public goal for residents of the City of Los Angeles, a goal which would not have been realized but for the efforts of Plaintiffs' attorneys in actively litigating this action for the past two years.

Defendants spend a great deal of time in their Opposition rearguing the evidence, despite the jury's unanimous finding that Plaintiffs prevailed on each and every one of their claims. However, such arguments about the evidence at trial are irrelevant to Plaintiffs' motion for attorneys fees as it is undisputed that

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4. . Indeed, both Pinner and Rodriguez testified in deposition that they were unaware of any LAPD policy or training which prohibited them from using a real person's name in a six pack ruse. [*See* Rodriguez depo at 43:4-44:1; Pinner depo at 262:4-266:19 (Exhibits A and B to Seplow Decl.)]

5. *See Oviatt v. Pearce,* 954 F.2d 1470, 1477 (9th Cir. 1992) (recognizing that "a policy of inaction..." can constitute an official policy, custom or practice for purposes of *Monell* liability).

the jury determined that Defendants violated Plaintiffs' constitutional rights.[6/]

In their Opposition, Defendants chiefly rely on *McCown v. City of Fontana*, 563 F.3d 1097 (9th Cir. 2009) to argue for a reduction in Plaintiffs' attorneys fees. However, *McCown* is readily distinguishable from this case. In particular, in *McCown*, the plaintiff settled a Section 1983 case for $20,000 after eight out of his nine claims had been dismissed on summary judgment, including his *Monell* claim. 563 F.3d at 1101-02. The Ninth Circuit remanded the District Court's decision to award plaintiff $200,000 in attorneys fees in order to take into account the fact that "plaintiff obtained limited success on his pleaded claims and the result does not confer a meaningful public benefit." 563 F.3d at 1103.

In contrast, in this case, Plaintiffs prevailed on all of their claims at trial. In addition to establishing that Defendants Pinner and Rodriguez violated Plaintiffs' civil rights, Plaintiffs also established that they acted with malice, oppression and/or a conscious disregard of Plaintiffs' rights and that their unconstitutional conduct was ratified by the Chief of Police. As a result of this case, the LAPD made important fundamental changes to its training which will help protect citizens in the future and the two named defendants have promised that their future

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6. Moreover, the jury's apportionment of fault between Plaintiffs and Defendants on Plaintiffs' wrongful death claim under California law is also irrelevant to Plaintiffs' motion for attorneys fees under Section 1988 in that there was no apportionment of fault on Plaintiffs' Section 1983 claim which established that Defendants acted with deliberate indifference towards Plaintiffs and/or their daughter. Indeed, there is joint and several liability in Section 1983 civil rights cases. *See Hall v. Ochs*, 817 F.2d 920, 926 (1st Cir. 1987). Unlike a claim for wrongful death under state law, a Section 1983 action vindicates important public rights. *See Riverside v. Rivera*, 477 U.S. at 574. Therefore, the apportionment of fault on Plaintiffs' state law claims should not in any manner diminish the significance of the determination that the Defendants were liable for violating Plaintiffs' constitutional rights. In any event, Plaintiffs' counsel have already deducted the amount of time spent on the damages portion of their case.

actions will be guided by the lessons learned from this case.[7]

III. PLAINTIFFS' ATTORNEYS' FEES ARE REASONABLE.

A. Defendants have failed to present evidence showing that the amount of time spent litigating this case is unreasonable.

In their opposition, Defendants, without making any specific showings or presenting specific evidence, challenge both the amount of hours expended on this case and the hourly rates of counsel. However, Defendants' challenges do not withstand scrutiny.

Defendants take issue with the fact that Plaintiffs had three lawyers at trial. However, Mr. Seplow only billed for four hours per day of his trial time.[8] Moreover, it is common for at least two lawyers to try a case, especially difficult and hard fought cases such as this one. The fact that Defendants had one lawyer and a paralegal at trial (not to mention the full resources of the LAPD and its investigators) does not mean that Plaintiffs' choice of counsel was unreasonable.

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7. Defendants argue that this Court should make a "substantial" reduction in Plaintiffs' attorneys fees as was done by the District Court in the *Mahach-Watkins* case. (Opposition at 17:18-19). However, as Plaintiffs pointed out in their moving papers, this case resulted in far more tangible benefits than *Mahach-Watkins*, in which there was no finding of any supervisory or *Monell* liability, no admission of wrongdoing by the individual defendant and no changes in training. Therefore, contrary to *Manach-Watkins*, any reduction by the District Court in the amount of fees requested by Plaintiffs' counsel in this case should be modest.

8. Defendants take issue with the fact that Mr. Raphling was added as Plaintiffs' counsel and took a lead role in trying this case, even though Mr. Schonbrun had been taking a leading role during depositions. However, Mr. Raphling's role in this case should not diminish the amount of attorneys' fees awarded to Plaintiffs. Indeed, Mr. Raphling has a lower hourly rate than Mr. Schonbrun and none of his work was duplicative, since whoever cross-examined the witnesses that Mr. Raphling handled at trial would have had to read and re-read their deposition transcripts and spend time preparing the examinations.

Moreover, Defendants focus only on the time spent on trial and fail to address the plethora of hours spent by counsel during discovery and pre-trial proceedings.

The Ninth Circuit has held:

> The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.

Gates v. Rowland, 39 F.3d 1439, 1449 (9th Cir. 1994) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir.1993).

In this case, Plaintiffs presented detailed declarations and time records in support of the hours they worked on this case. In response, Defendants have failed to submit specific evidence challenging the reasonableness of the hours that Plaintiffs spent on this case. Instead, Defendants only offer speculative arguments that three counsel were not needed at trial, and that it was unnecessary for Mr. Raphling to serve as trial counsel. Under these circumstances, it is apparent that Defendants have failed to meet their burden to challenge the reasonableness of Plaintiffs' counsel's hours. *See Gates v Rowland,* 39 F. 3d at 1449 (finding that "the defendants failed to meet their burden of rebuttal by submitting evidence to challenge the assertions of the plaintiffs' counsel.").

The Ninth Circuit has further recognized that a competent civil rights lawyer must constantly revisit his work on a case and is not likely to churn fees since he is working on contingency:

> The court may reduce the number of hours awarded because the lawyer performed unnecessarily duplicative

> work, but determining whether work is unnecessarily duplicative is no easy task. When a case goes on for many years, a lot of legal work product will grow stale; a competent lawyer won't rely entirely on last year's, or even last month's, research: Cases are decided; statutes are enacted; regulations are promulgated and amended. A lawyer also needs to get up to speed with the research previously performed. All this is duplication, of course, but it's necessary duplication; it is inherent in the process of litigating over time.
>
> It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case. . .

Moreno v. City of Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008).

In this case, Plaintiffs counsel had to revisit over a year's worth of work they did during discovery in order to prepare for trial. As civil rights lawyers working on contingency, Plaintiffs' counsel did the work necessary to prevail in this case and did not unnecessarily waste precious time and resources on needless or duplicative work.

B. Plaintiffs' counsel's hourly rates are reasonable.

In their motion, Plaintiffs presented detailed declarations from two

prominent civil rights lawyers, Carol Sobel and Barry Litt, attesting to the reasonableness of the hourly rates requested by Plaintiffs' counsel ($650 for Mr. Schonbrun, $590 for Mr. Seplow and $525 for Mr. Raphling). These declarations included a detailed analysis of hourly rates charged by comparable attorneys in the relevant legal community. In response, Defendants have offered nothing more than the unsubstantiated opinion of attorney Thomas Hurrell that Plaintiffs' counsel's rates are too high, without any reference or comparison to rates charged in other specific cases, other than a cursory reference to three California Superior Court cases.[9/]

Notably, Mr. Hurrell concedes that Mr. Raphling's rate of $525 per hour is close to a reasonable rate. [Hurrell decl. at ¶ 6] However, Defendants misconstrue Mr. Hurrell's declaration and wrongfully assert that the Court in *Jochimsen v. County of Los Angeles* reduced Mr. Raphling's hourly rate to $400. [Opposition at 19:23-24] The Court did no such thing. Instead, the trial Court in *Jochimsen* simply reduced Plaintiffs' gross attorneys' fee award by 23.5% of the amount requested (which included work performed by other lawyers) for "unnecessary time that was incurred." [Raphling Decl at ¶¶ 3-4; Exhibit A] The *Jochimsen* court did not make any findings about Mr. Raphling's hourly rate and in fact noted that Mr. Raphling and his co-counsel "demonstrated skill in prosecuting [the] claim." The case was prosecuted skillfully against a vigorous and effective defense." *Id.*

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9. One of the cases mentioned by Mr. Hurrell, *Aikens v County of Ventura*, was not a Section 1983 civil rights case at all Instead it was an inverse condemnation proceeding in Ventura County Superior Court pursuant to California Code of Civil Procedure Section 1036. [Exhibit C to Seplow Decl.] Further, in *Mock v. City of Los Angeles,* the California Court of Appeal determined that Plaintiff had not pled a Section 1983 claim and therefore was not entitled to attorneys fees. [Exhibit Dto Seplow Decl.] Moreover, Mr. Hurrell's statement that the hourly rate set by the Court in the *Jochimsen* case was between approximately $225 and $375 is simply incorrect. [Raphling Decl at ¶ 4]

Plaintiffs have presented detailed and competence evidence attesting to the reasonableness of their requested hourly rates. The sparse declaration of Thomas Hurrell does not provide a basis to deviate from the rates requested by Plaintiffs. Accordingly, Plaintiffs' counsel should be awarded their requested hourly rates.

IV. PLAINTIFFS' REQUEST FOR ATTORNEYS FEES SHOULD NOT BE AFFECTED BASED ON INTERROGATORY RESPONSES.

Without providing any legal support whatsoever, Defendants contend that Plaintiffs violated Rules 11 and 26 of the Federal Rules of Civil Procedure with respect to their interrogatory responses concerning contact with attorney Gary Casselman and that as a result their motion for attorneys fees should be denied.

At no time have Plaintiffs Martha Rauda or Regulo Puebla personally ever communicated with attorney Gary Casselman or his office. [Schonbrun Decl. at ¶¶ 6, 9] Mr. Casselman was counsel for Plaintiff Juan Catalan in a 2005 case against Defendants Pinner and Rodriguez for false arrest. Defendants sought to discover whether Plaintiffs communicated with Mr. Casselman or any other attorney about filing a lawsuit about their daughter's death in order to determine when Plaintiffs first learned of their possible claims against Defendants. [10/] In response to Interrogatory No. 14, Plaintiffs truthfully responded that they have never spoken with any other attorney (other than their counsel in this case) about filing a lawsuit against the LAPD for the death of their daughter. [Schonbrun Decl. at ¶ 7]

Interrogatory No. 13 asks: "Have you ever had any written, email or spoken communications with any attorney, employee or agent of the Law Offices of Gary Casselman." The manner in which this interrogatory is phrased led Plaintiffs' counsel to interpret it as asking if the Plaintiffs personally ever had

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10. Plaintiffs have testified that they did not learn of the LAPD's involvement in their daughter's death until approximately February 2008 when Mr. Puebla's niece told him about an article that she read on the internet.

communications with Mr. Casselman's firm (as opposed to any communications that Plaintiffs' counsel may have had with Mr. Casselman). [Schonbrun Decl. at ¶ 9] [11/] Plaintiffs responded that they had no contact with Mr. Casselman or his office. Defendants contend that the interrogatory included both the Plaintiffs and their counsel. While Plaintiffs personally never had any communications with anyone affiliated with Mr. Casselman, Plaintiffs' counsel did have some minimal communications with Mr. Casselman **after** this lawsuit had been filed. [Schonbrun Decl. at ¶ 10] In retrospect, Plaintiffs' counsel acknowledge that they should have been more clear in their response to Interrogatory No. 13 to indicate that it was Plaintiffs personally who never had any communications with the Casselman firm. [*Id.*] Nonetheless, any communications between Plaintiffs' counsel and attorney Casselman, which clearly would reveal counsel's opinions, thought process and mental impressions, are protected as attorney work product and would not have been discoverable. [*Id.*] *See In Re Cendant Corp Securities Litigation*, 343 F.3d 658, 663-64 (3d Cir. 2003) (recognizing almost absolute protection for attorney work product which would reveal attorneys' opinions, mental impressions or thought process); *Sanchez v. Matta*, 229 F.R.D. 649 (D.N.M. 2004) ("the work product privilege also protects the mental processes, mental impressions, personal beliefs and the litigation strategy of an attorney or his or her agents.") (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)); *see also* FRCP 26(b)(3) limiting disclosure of trial preparation materials and providing that the court "must protect

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11. Indeed, the "you" in the interrogatory is not capitalized (as it is in the Definitions section) and as other defined terms are elsewhere in the interrogatories. Moreover, the interrogatory asks if a translator was used in any communications with the Casselman firm. Therefore, the manner in which the interrogatory was phrased, and the context in which it was used (i.e. seeking to determine if Plaintiffs were aware of the LAPD's role in their daughter's death prior to the filing of this lawsuit) led Plaintiffs' counsel to believe that this interrogatory targeted to determine whether Mr. Puebla and Ms. Rauda had personally communicated with Casselman's office. [Schonbrun Decl. at ¶¶ 8- 9]

against disclosure of the mental impressions, conclusions, opinions or legal theories or a party's attorney. . .").[12/]

Defendants' attempt to use the manner in which Plaintiffs responded to Interrogatory No. 13 to defeat Plaintiffs' motion for attorneys fees is utterly without legal support. Plaintiffs' counsel's inadvertent mistake in responding to Interrogatory No. 13 amounts to nothing more than a harmless error at best and should not in any way affect Plaintiffs' right to an award of reasonable attorneys' fees.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion for reasonable attorneys' fees and costs should be granted. [13/]

Dated: December 6, 2010

SCHONBRUN DESIMONE SEPLOW HARRIS HOFFMAN & HARRISON LLP

THE LAW OFFICES OF JOHN RAPHLING

By: _____
Benjamin Schonbrun
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John Raphling
Attorneys for Plaintiffs

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12. In their response to Interrogatory No. 13, Plaintiffs asserted objections to the interrogatory as being "vague, ambiguous and overly broad" and also on the grounds that it seeks information protected from disclosure by the attorney client and/or attorney work product privileges." Plaintiffs' responses were made "subject to and without waiving these objections." [Schonbrun Decl. at ¶8]

13. Defendants have failed to challenge Plaintiffs' request for reimbursement for out of pocket costs in the amount of $13,542.93. Accordingly, this Court should award Plaintiffs these reasonable costs. *See Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005).